Supreme Court, U.S.
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No. 92-172

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF COLORADO
Petitioner,

vs.

NORRIS JONES,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

On Petition For Writ Of Certiorari To The Colorado Supreme Court

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QUESTION PRESENTED FOR REVIEW

Whether the Colorado Supreme Court correctly held that no significant intervening factor existed to attenuate the custodial statements of Norris Jones from his arrest without probable cause?

STATEMENT OF THE CASE[1]

On January 7, 1991 at 3:35 p.m., Detective DeMott received a call on a man found dead in his apartment who appeared to have been beaten. Death may have occurred several days before. The manager of the apartment building told police that he had seen someone with the victim the month before on different occasions, no specific times. The man was seen with the victim, but no one heard them talking and there were no problems.

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1. The factual statement in the Petition contains numerous errors and significant omissions, which will be corrected as follows.

Detective DeMott testified that the description of this man "reminded"[2] him of a man by the name of "Norris" whom he had occasionally contacted, although never arrested, during his years as a street officer (which ended in 1984). Detective DeMott and his partner Detective DeSanti left the apartment building at about 7:00 p.m. and went to the Colorado Cafe a short distance away to see if "Norris" might be there.

Detective DeMott went inside the cafe where he observed Norris Jones, then returned to get his partner.[3] They both entered the cafe, saw Norris at the counter drinking coffee and surrounded him, with Detective DeSanti on the left-hand side and DeMott on the right-hand side.[4]

DeMott testified that he tapped Norris Jones on the shoulder to get his attention, introduced himself, and asked him if the police could talk to him downtown. Mr. Jones appeared to be surprised. DeMott claimed that Norris Jones agreed to go with police, al-

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2. Detective DeMott did not testify that he "recognized" the man (Petition, page 3).

3. The detectives did not testify that they both immediately spotted the defendant at the cafe as claimed (Petition, page 3).

4. Testimony at the suppression hearing established the mental state of Norris Jones: He was committed to a mental hospital as a young child, had prolonged hospitalizations, received anti-psychotic medications and was diagnosed as having organic brain disorder, brain damage, and mental retardation. His early medical records indicated that he was tied to the bed as an infant, beaten, and punished (including being starved for days). He was emotionally deprived and showed early evidence of depression.

He was diagnosed as having an IQ of 66 in 1970 and his mental retardation diagnosis continued. Doctors had found that he had difficulty in coping and perceiving things and that he had difficulty understanding or conceptualizing information he received from people.

Dr. Kathy Morall, a psychiatrist, examined Norris Jones at the county jail several years before and noted his intellectual limitation. She examined him again in April of 1991 and testified at the suppression hearing. The most striking thing Dr. Morall noticed was the limitation in his verbal skills. He was able to communicate, but it was difficult and called for clarification before he could complete responses to her questions. She also noticed his difficulty in comprehension. That was demonstrated not only in the conversations she had with him, but also in the mental status examination when he was asked to do abstractions which were almost impossible for him. He had a very simplistic way of communicating and people had to be careful in the way they discussed things with him or gathered information to be sure he really understood. Dr. Morall testified that there were things that Norris Jones would never understand when she was with him, in spite of the time that she tried to give him.

though his partner did not hear this. Norris Jones had his hands handcuffed behind his back and was escorted out of the restaurant, without being given a chance to pay for his coffee. Concerning the handcuffing, Detective DeSanti testified:

Q Do you know why this individual was handcuffed at that time?

A Joe put the handcuffs on him, that's why he was handcuffed.

Detective DeMott admitted that he and DeSanti had alternatives to handcuffing Mr. Jones: They could have asked him to step outside where any dangerous objects could be removed, they could have had him remove his jackets and pouch either outside the restaurant or in the police car, they could have conducted a thorough pat-down and removed any object that might be a weapon, and they could simply have questioned him at the restaurant about whether he knew the victim and what he might know about the victim's death. Detective DeMott also admitted that in his own prior contacts with Mr. Jones he had never seen him with a weapon and that police had no information from anyone that Mr. Jones had been seen with a weapon. In fact, Mr. Jones was found to have no weapons on him.

Detective DeMott testified that the proper police procedure is that after a stop and frisk, the police either arrest a person or let them go; DeMott admitted this was not done here. Mr. Jones was placed in the police car, but instead of driving to the police station, DeMott drove back to the apartment house for a one-on-one show up, where Norris Jones was identified by the manager as a person who had been seen with the victim the month before.

At the apartment house, in the police car, Detective DeMott admitted that he had another conversation with Norris Jones. He told Mr. Jones they were going to go to headquarters and ask him some questions, that the handcuffs would come off at the police station, and that after he spoke with police he would be free to leave. Police never explained why Mr. Jones had been picked up or what was happening.

Once at the police department, Mr. Jones was finally unhandcuffed and asked to remove his pouch and coats. (No attempt was made to pat-down his pants although DeMott had claimed earlier that he was concerned about the pants containing a weapon.) DeSanti left to check the police records.

Police advised Mr. Jones of his Miranda rights and was finally told why police wanted to talk to him. DeMott told Mr. Jones about the homicide and said police wanted to talk to him because he may have been one of the last people to see the victim. Mr. Jones said he knew the victim, had been over to his apartment, but didn't know him that well; he told police he hadn't seen the victim in a couple of weeks.

DeMott told Norris Jones that the victim had been murdered; Mr. Jones denied any involvement. DeMott persisted and told Mr. Jones to tell him what he knew about the murder, and Mr. Jones repeated that what he knew was that he didn't do it. Mr. Jones was not released, and the custodial interrogation continued.

DeMott admitted that he told him, "Well, you know, we do have some blood with a fingerprint on the railing in the apartment building." DeMott claimed at the hearing that he thought he had seen a fingerprint in the blood, although there was no lab report of any such print; DeMott claimed he had asked the lab to compare the print at the scene just before he began questioning Mr. Jones (there was no lab report of any such request or comparison). DeMott admitted that there was no indication in his own report that he had spoken with anyone from the lab about a fingerprint and that it would be unusual for the lab not to file a report if a request had been made. On cross-examination he admitted that perhaps no lift of any "print" was ever done. The trial court in its written findings held:

> Given the fact that the lab crew did not preserve the "print", the Court finds that Detective DeMott was told at the scene that the "print" had no evidentiary value. Nevertheless, intending to elicit an incriminating response, Detective DeMott told the Defendant that a fingerprint had been found in some blood on the railing.

At the hearing, DeMott testified that Mr. Jones told him he was worried he would go to prison if he told; DeMott told him "Norris, you have to tell us what happened, you have to give us your side of it; otherwise we will never know what your side of the story is." At this point, Mr. Jones began to cry as he told DeMott that the victim had repeatedly tried to have sex with him, attempted to grab him and take off his clothes and that Mr. Jones tried to push him away, telling him over and over that he didn't do that sort of thing with men. He told Detective DeMott the victim tried to rape him and when he couldn't stop him, he got a hammer and started to strike him with it. He never told police he was trying to kill the man, wanted him dead, or even knew that the man was dead when he left the apartment. Norris Jones continued to cry throughout.

Concerning this statement and the subsequent one, the trial court after viewing the video-taped statement specifically found:

> The first interview lasted fifteen minutes. When Detective DeMott opened the door of the office, he told Detective DeSanti that the Defendant had confessed. Detective DeSanti told Detective DeMott that there might be[5] a warrant out for the Defendant's arrest for an unpaid traffic fine, but that this was unverified. Neither detective attempted to call the County Court to determine the status of the possible warrant. Neither relied on the existence of a warrant for any reason. Neither took the Defendant to the County Court Clerk's Office to pay his fine.[6] (Footnotes added.)
>
> Instead, preparations were made for the video-taped interview. The Defendant was left in the sergeant's office until the video room was ready. Detective DeMott led him to the video room, and at 7:52 p.m. began the second interview by asking the Defendant if he remembered being advised of his rights at 7:20 p.m.. Detective DeMott rapidly repeated the rights while the Defendant looked at the floor. During the procedure, the Defendant was distracted when the alarm on his watch began

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5. The Petition incorrectly states that "DeMott learned from DeSanti that there was a general sessions warrant for the Defendant's arrest" (emphasis added) (Petition, page 4).

6. At the suppression hearing, the prosecution introduced various documents in an attempt to prove the existence of a valid "warrant". Mr. Jones had been arrested October 16, 1990 for loitering; he appeared before a municipal judge and was given a fine and jail sentence, but was not represented by a lawyer. The sheriff later initiated a memo in connection with releasing Mr. Jones early, in which various "credits" were calculated and the amount of money the sheriff believed he now owed was set forth. No judge ever entered that order or was consulted. When the money the sheriff said was owed was not paid, a clerk (not a judge) issued a mittimus based on the sheriff's memo (not a judge's order). The effect of the mittimus was that if Mr. Jones was picked up on something else, he could then be brought before the clerk, pay the balance and be released.

buzzing. He reached over and turned it off. Detective DeMott asked the Defendant to repeat the story he had told him before. Throughout the interview, Detective DeMott reminded the Defendant about what he had said before. He confronted the Defendant with inconsistencies. The detective concluded by reviewing the evening's events with the Defendant and by trying to elicit the Defendant's agreement that he voluntarily accompanied the detectives at the cafe. The Defendant, however, said, "I did come, I didn't fight." Detective DeMott's attempt to elicit confirmation from the Defendant that he had told the Defendant he could leave at any time was met with what can be best characterized as a stare of disbelief from the Defendant.[7] The second interview concluded at 8:09 p.m..

REASONS FOR DENYING THE WRIT

THE COLORADO SUPREME COURT CORRECTLY DECIDED THAT THE TAINT OF THE ILLEGAL ARREST RENDERED MR. JONES' CONFESSIONS INADMISSIBLE UNDER THE ATTENUATION ANALYSIS ANNOUNCED IN BROWN v. ILLINOIS

Where a Defendant is arrested without probable cause, a confession subsequently obtained is inadmissible unless the effects of the illegal arrest have become so attenuated so as to dissipate the taint of the illegal police actions. Wong Sun v. United States, 371 U.S. 471 (1963).

In Brown v. Illinois, 422 U.S. 590 (1975), this Court established a three-factor test for determining whether, under "the facts of each case," with no single fact being dispositive, the taint of an illegal arrest has become sufficiently attenuated so as to allow admission of a confession obtained following the arrest. "The voluntariness of the statement is a threshold requirement." Id. at 604.

In Dunaway v. New York, 442 U.S. 200 (1979) and Taylor v. Alabama, 457 U.S. 687 (1982), this Court applied the Brown test and found the confessions resulting from illegal arrests inadmissible. In New York v. Harris, 495 U.S. 14 (1990), this Court held a confession following an arrest made with probable cause, but without a warrant was admissible. Since in Harris the illegality of the arrest was caused by the absence of a warrant rather than the absence of probable cause, the illegality dissolved once the Defendant was outside his home;

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7. The trial court's specific findings on this issue contradict the claim by the prosecution in its Statement of the Case that "at their request Norris agreed to talk with them and to go with them to the police station" (Petition, page 3).

his incarceration was not illegal. Due to the fact that there was no illegal custody, there was no taint. As a result, no attenuation analysis was necessary in order to determine the admissibility of the subsequent confession.

In this case, the Colorado courts correctly applied the federal constitutional standards announced in Brown and followed in Dunaway and Taylor. The Colorado Supreme Court clearly limited its holding to the unique facts of this case:

> Clearly, the Defendant's second confession did not constitute an act of free will sufficient to purge the primary taint of the illegal arrest. Jones' second confession stemmed directly from the first confession which was interrupted by the detective asking Jones if he would repeat the statement on video-tape. In fact, only a mere fifteen minutes elapsed between the first and the second confession, during which time the officers prepared the video-tape equipment. Further, the circumstances of the illegal arrest did not change between the first and second confession. During the time, Jones was left alone in the same room where he had made his first confession. He did not talk to an attorney, or anyone else, between the two confessions. We hold that because the second confession was closely related in time and by circumstances to his earlier, illegally induced statement, the second confession is inadmissible, despite the fact that Miranda warnings were given before the second interview began.
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> . . .
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> We agree with the District Court's conclusion that the existence of this unverified warrant, of which the Defendant had not been informed, did not contribute to the Defendant's ability to exercise his free will. In fact, the evidence supports the conclusion that the Defendant's confession did not constitute an act of free will. Thus, the existence of the warrant did not constitute an intervening factor sufficient to remove the taint from the derivative evidence.

People v. Jones, 828 P.2d 797, 800-801 (1992).

The State claims that the clerk-issued mittimus for the non-payment of a fine constituted probable cause to place Mr. Jones in custody and that this operated as a break in the causal chain resulting from his illegal arrest so as to dissipate the taint of the arrest. There are a number of problems with the State's contentions.

1. The prosecution failed to meet its burden of establishing that the mittimus was in fact an "arrest warrant". Although the trial court and the Colorado Supreme Court referred to the mittimus as an arrest warrant, under Colorado Statutes an "arrest warrant" is

"a written order issued by the judge of a court of record directed to any peace officer commanding the arrest of the person named or described in the order." Section 16-1-104(18) 8A Colo. Rev. Stat. (1986)[8] (Emphasis added) Since the mittimus was issued by a court clerk and not by a judge, a serious question exists as to whether the mittimus constituted a valid "arrest warrant".

2. Even assuming that there was a valid arrest warrant, both the trial court and the Colorado Supreme Court concluded that the prosecution had failed to meet its burden of establishing the validity of the warrant as constituting authority to place Mr. Jones in custody or that the police relied in any way on the warrant as constituting authority to retain Mr. Jones in custody. In its suppression order, the trial court stated: "The prosecution fails, however, to adequately explain how the existence of this warrant, which had not been verified, which was not relied upon by the police, and whose existence had not been communicated to the Defendant, could possibly have contributed to his ability to consider his options carefully and objectively to exercise his free will." Order at B-10, Petition.

3. In light of the substantial testimony presented at the suppression hearing as to Mr. Jones' mental deficiencies and the coercive police conduct involved in the apprehension and questioning of Mr. Jones, there is a serious question whether Mr. Jones' statements were voluntary. Apparently because it found that the statements should be suppressed by application of the derivative evidence exclusionary rule, the trial court did not address the issue of the voluntariness of the statements obtained from Mr. Jones.

4. In light of the fact that the police were only aware of the first name of Norris Jones, the question remains whether they could have "arrested" him on the clerk-issued mittimus.

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8. In its order of suppression, the trial court stated, "the defense successfully demonstrated that the warrant was not issued by a magistrate after a determination of probable cause." Order at B-11, Petition.

The State offers a number of cases for the proposition that probable cause constitutes either an independent basis for retaining custody or an intervening event which dissipates the taint of the illegal arrest. Many of these cases are distinguishable. In United States v. Cherry, 759 F.2d 1196 (5th Cir. 1985), there was no confession at issue; the Court dealt with fingerprint evidence and the applicability of the exclusionary rule. Likewise, in United States v. Maier, 720 F.2d 978 (8th Cir. 1983), the issues surrounding the exclusionary rule were not on point since the question presented centered around the search of a car following a legal inventory search despite an initial illegal stop.

In Townsley v. State, 652 S.W.2d 791 (Tex.Crim.App. 1983), the Court held that the discovery of probable cause to arrest the Defendant while being held illegally was a factor to be considered under the attenuation analysis and under the circumstances of the case, the taint had sufficiently dissipated. There the Defendant's confession was sufficiently attenuated from his illegal arrest where he confessed nearly 30 hours after the arrest and 23 hours after probable cause existed to legally arrest him; in addition, the facts established the confession was truly the exercise of Defendant's free will.

In United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979) and United States v. Morris, 592 F.2d 341 (2d Cir. 1979), both cases were remanded for further findings. Neither case held that discovery of independent grounds to legally arrest was "dispositive" and that the attenuation analysis under Brown was inapplicable. In Morris, the Court remanded in part for a determination of the officer's knowledge of intervening events when questioning Defendant.

In Wicker v. State, 667 S.W.2d 137 (Tex.Crim.App. 1984), the Court declined to decide if the initial arrest was illegal and held that a grand jury indictment subsequent to the arrest as well as significant attenuation (confession made five days after arrest) permitted admission of the confession.

The State asserts that the Colorado Supreme Court ignored the effect of an outstanding arrest warrant in applying the attenuation analysis of Brown. The State misperceives the Colorado court's ruling. The Colorado Supreme Court merely held that the State had failed to meet its burden of establishing that a valid independent basis for subjecting Mr. Jones to custodial arrest existed and was relied on by the police as a basis for continuing its custody of Mr. Jones, following his admittedly illegal arrest. The Colorado court did not dismiss the existence of a valid arrest warrant from the attenuation analysis; it simply held that the State had failed to establish as a factual matter the existence of probable cause to hold Mr. Jones independent of the initial illegal arrest. It did not hold that there could never be such a situation, only that it was not established in this case.

The State also asserts that the issues of this case are not "case specific". This is obviously wrong. Nothing could be more case-specific than a situation where ambiguous information is contained in the court file, which may or may not constitute probable cause to arrest, and it is not clear whether the police relied on that information as a basis for retaining custody of the Defendant. The situation here is so full of ambiguities that it is not only unlikely to be repeated, but in addition the ruling on the factual situation in this case would have little precedential value.

The Amici Curiae request that this Court promulgate a decision which would graft the independent source doctrine, see, e.g., Murray v. United States, 487 U.S. 533 (1988), onto the attenuation analysis of Brown. The wisdom of such a course of action is questionable at the least in light of the fact that such a contention was never "pressed or passed upon" by the State in the Colorado courts (and there is but slight mention of such an approach in the State's Petition for Certiorari). See Illinois v. Gates, 462 U.S. 213 (1983).

The State represents that this case should be reviewed by this Court in that it involves "an extremely small record of a two-witness hearing, minimizing any disputes of historical fact and making it extremely unlikely that the ultimate rule of decision could involve issues

that are not already apparent". (Petition at 6-7) The State's contention is inaccurate. The hearing lasted for two days, with a third day for argument. Four separate witnesses testified. The total transcript involves three volumes and approximately 347 pages.

The prosecution's claimed urgency to have this Court accept this case for review was not duplicated when the Colorado Supreme Court was likewise asked by the prosecution to stay the trial proceedings and accept this case for immediate review. The cases the prosecution now claims should be dispositive were not cited by the prosecution to the Colorado Supreme Court (only three of a total of 24 cases now cited in the Petition were offered by the prosecution in their appeal to Colorado's Supreme Court). The prosecution further chose to forego its fight to file a Reply Brief pursuant to Colo. R. App. P. 4.1(f), which not only evidences a lack of concern over the issues at the time the Colorado Supreme Court was considering it at its request, but raises questions of whether the prosecution has, in fact, properly exhausted all remedies at the State level.

CONCLUSION

The Respondent, Norris Jones, respectfully requests that this Court deny the petition for writ of certiorari to review the decision of the Colorado Supreme Court in People v. Jones, 828 P.2d 797 (Colo. 1992).

Dated this ____ day of August, 1992.

DAVID F. VELA
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CERTIFICATE OF SERVICE

I, Thomas M. Van Cleave III, hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was served on Nathan B. Coats, Chief Deputy District Attorney, Denver District Attorney's Office, 303 West Colfax Avenue, Suite 1300, Denver, Colorado 80204 on August 26, 1992.

Thomas M Van Cleave III

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I, NATHAN B. COATS, a member of the Bar of this Court, hereby certify that on this 3rd day of September, 1992, a copy of the PETITIONER'S REPLY TO BRIEF IN OPPOSITION in the above-entitled case was mailed, first class postage prepaid to counsel for respondent herein, Sunwolf, Deputy State Public Defender and Lauren Cleaver, Deputy State Public Defender, 110 - 16th Street, Suite 1300, Denver, Colorado 80202. I further certify that all parties required to be served have been served.

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